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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. EDWARD JONES et al., Defendants and Appellants.	D038250 (Super. Ct. No. SCD147553)
In re EDWARD JONES on Habeas Corpus.	D039422

APPEAL from judgments of the Superior Court of San Diego County, William D. Mudd, Judge. Judgments affirmed as modified. Petition for writ of habeas corpus denied.

In an amended information filed in November 2000, the District Attorney for San Diego County charged defendants Anthony Penton and Edward Jones under Penal Code[1] section 211 with robbery (count 1), under sections 664 and 211 with five counts of

attempted robbery (counts 2-6), and under sections 236 and 237, subdivision (a) with two counts of false imprisonment by violence, menace, fraud or deceit (counts 7 & 8). The information also alleged under section 12022.53 on all counts that Penton and Jones each personally used a firearm. It was also alleged under section 667.5, subdivision (b) that Penton served two prior prison terms; under section 667, subdivision (a)(1) that he had a prior serious felony conviction; and under sections 667, subdivisions (b) through (i) and 1170.12 that he had a prior strike conviction. The information alleged under section 667.5, subdivision (b) that Jones had served four prior prison terms. Penton and Jones pleaded not guilty and denied all allegations.

Penton and Jones were tried together in a jury trial commencing in November 2000. The jury convicted them on all charges and also found the special allegations true. The People dismissed two of the section 667, subdivision (b) prior prison term allegations as to Jones, and the court found true the remaining prior conviction allegations against both Penton and Jones. The court sentenced Penton to a term of 54 years 8 months and Jones to a term of 37 years.

In March 2000, prior to the trial in this matter, Penton pleaded guilty in San Bernardino County case No. FV1010921 to a violation of Health and Safety Code section 11359, possession of marijuana for sale. Penton was sentenced to a term of 32 months in prison in that matter. In its sentencing of Penton in this case, the court stated that the sentence in this matter was "to run consecutive to FV1010921."

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1 All further statutory references are to the Penal Code unless otherwise specified.

On appeal, Jones contends that (1) the court erred in denying his motion for new trial brought on the grounds that he received ineffective assistance of counsel; (2) the evidence is insufficient to convict him on counts 2 through 7 and to support the finding that he personally used a firearm on these counts; (3) the court failed to exercise its discretion to determine if Jones's sentences should run concurrently or consecutively; and (4) the court's instruction under CALJIC No. 17.41.1 violated his right to a fair trial. Jones also joins in the arguments raised by Penton to the extent they benefit him. In January 2002 Jones also filed a petition for writ of habeas corpus (petition), asserting that the judgment must be reversed because he rejected a plea offer based upon incorrect information given by the court and counsel concerning the maximum term he could receive upon conviction. The petition has been consolidated with the appeal for purposes of disposition.

On his appeal, Penton asserts that (1) the court erred in denying his motion for a new trial brought on the grounds that the People violated their discovery obligations and his right to confrontation by relying on improper hearsay evidence; (2) the court failed to exercise its discretion to determine if his sentences should run concurrently or consecutively; (3) his sentence in San Bernardino County case No. FV1010921 must be modified to a sentence of one-third the midterm; and (4) the court failed to exercise its discretion to determine if it should dismiss his prior strike allegation.

We conclude that Penton's sentence in San Bernardino County case No. FV1010921 must be modified to reflect a sentence of one-third the midterm under section 1170.1, with credit for presentence custody in that case, and order the court to modify the

abstract of judgment to reflect this modified sentence. In all other respects the judgments are affirmed. Jones's petition is denied.

FACTUAL AND PROCEDURAL BACKGROUND

A. *People's Case*

On June 26, 1999, at approximately 9:30 a.m., Roy French stopped at Symbolic Motors in La Jolla, California, to see what types of classic cars they had in their showroom. While there, French saw Penton and Jones enter. One was talking on a cellular telephone. The two men walked up to French and Symbolic sales representative Roger Phillips, pushed them, and told them to move to the back of the showroom. Phillips objected, and Penton pulled out a handgun.

Once they were at the back of the showroom, Jones demanded French's wallet, took money out of it, and moved French into a small office. Jones ordered French to lie down on the floor between a desk and wall.

Phillips was moved into the office with French, and Penton demanded that Phillips tell him where the company's safe was. When Phillips stated that he did not know where the safe was, Penton slapped him in the back of his head. Penton was talking on a cellular telephone during this period, apparently getting instructions. Penton told Jones to "put one in the back of his head" and see if Phillips could open the safe then. French looked up at Jones, who had his gun pointed at him. The discussion was interrupted by a sound coming from outside the office. Penton and Jones left to investigate.

At approximately 10:15 a.m., Ramon Bazaldua, a car detailer, arrived for work at Symbolic. As he entered the showroom, Penton asked him, "Are you the big guy?"

Bazaldua replied that he was just a detailer and began to proceed through the showroom. However, Penton put a gun in Bazaldua's back and stated, "Walk this way, mother-fucker. Some people want to see you."

Bazaldua was taken to the office with Phillips and French. Jones bound the feet and hands of French, Phillips and Bazaldua with duct tape and made them lie down together on the floor. At one point French looked up from the floor and Penton put his foot on French's back, stating, "I think you're trying to eyeball me, boy," and threatened to shoot him. Penton asked who owned the black Jaguar parked in front of Symbolic and French stated that it belonged to him. Jones then took the keys to French's Jaguar out of French's pants pocket.

Sean Hughes arrived for work at Symbolic shortly thereafter, accompanied by his two daughters, ages six and eight. Penton encountered Hughes in the showroom and asked if he was the owner. Hughes replied, "No," and Penton ordered Hughes to the back of the showroom. Hughes could tell from the tone of Penton's voice that something was wrong and asked if his daughters could wait out in his car. Penton said, "No." Penton then led Hughes and his daughters to the back, where they encountered Jones. Penton and Jones led Hughes and his daughters to an upstairs office where Symbolic's two safes were located. The men asked Hughes if he had a key to unlock the door to the office. Hughes demonstrated for Jones and Penton that his keys would not open the door.

Penton and Jones then forced Hughes to lie down on the floor with his daughters. Jones removed duct tape and two handguns from a plastic bag he was carrying and taped Hughes's arms behind his back. While Hughes was on the floor, Penton received a call

on his cellular telephone. Jones handed one of the guns to Penton, who went back downstairs. Jones remained upstairs with Hughes and his daughters. Jones asked Hughes what he had in his pockets. Hughes replied that he had $10 and a cellular telephone. Jones stated that he did not want the $10 and turned off Hughes's cellular telephone. The men had said they were looking for cash.

After approximately one-half hour, Hughes heard someone yelling, "[H]e's running." Jones ran down the stairs and did not return. When Hughes heard police officers on a bullhorn, he broke free from the duct tape, locked his daughters and himself in another office upstairs, and called 911. Hughes stayed on the telephone with police until officers came upstairs and led him and his daughters outside.

Shannon Williams arrived for work at approximately 10:15 a.m. When she entered the showroom she saw Penton talking on his cellular telephone. Williams asked Penton if he needed any help. Penton took a gun out of his belt and told her to follow him.

Robert Kueber arrived for work shortly after Williams. Penton displayed his gun to Kueber and ordered Kueber and Williams to Williams's office. Halfway through the showroom, Kueber ran out and across the street, where he telephoned police from a gas station.

Penton took Williams to her office and instructed her to sit on the floor. Penton threatened that if she moved he would come back and shoot her. Penton and Jones then ran out of the building. Williams dialed 911 on her cellular telephone.

After police arrived, a field evidence technician recovered a plastic bag from the upstairs area of Symbolic. Upon subsequent examination, Jones's fingerprints were found on the bag.

Several days later, on June 29, 1999, San Diego Police Officer Andrew Spear saw Jones speeding in a tan rental car. When Officer Spear approached the vehicle in his police car, Jones sped up and turned into an alley. Officer Spears activated his lights and siren and pursued Jones. While in pursuit, Officer Spear saw Jones throw a gun out the window of his car. Jones was eventually stopped and placed under arrest. A search of the vehicle found a holster under the driver's seat that fit the gun Jones had thrown out the window. It was also determined that Penton had rented the car on June 4, 1999, about three weeks prior to the charged crimes.

Police determined that two cellular telephone numbers linked to Penton had made and received 32 telephone calls to and from the La Jolla area the morning of the robbery. Police executed a search warrant at Penton's home and recovered a tablecloth with his nickname, "Mr. Goo," and one of the telephone numbers called the morning of the robbery written on it. Police also found a box of .45-caliber ammunition and a key chain with the logo for Enterprise Rental Car listing the make, model and license plate number of the car Penton was driving when he was arrested.

Williams and Hughes identified Penton and Jones in photographic lineups, live lineups and at trial. Kueber identified Penton in lineups and at trial. French and Bazaldua were unable to identify Penton and Jones in lineups or at trial.

B. *Defense Case*

Scott Fraser, Ph.D., a neurophysiologist, testified on Penton's behalf concerning the reliability of eyewitness identification. Doctor Fraser testified that research indicated that the type of identifications made in this case could be inaccurate. However, Dr. Fraser could not say whether the eyewitnesses in this case accurately identified Penton and Jones.

C. *The New Trial Motions*

1. *Jones's motion*

Following his conviction, Jones filed a motion for new trial. Jones argued that his trial counsel was ineffective, citing his counsel's alleged failure to interview potential alibi witnesses, to consult possible expert witnesses, to present exculpatory evidence concerning an alibi defense, to investigate physical evidence, and also challenging several tactical decisions made during trial.

In support of his motion, Jones pointed out that his trial counsel objected to the testimony of the People's forensics specialist because he had only received photographs showing Jones's fingerprints on the bag the morning of the first day of trial and other documents concerning the fingerprint analysis the day before. Trial counsel argued to the court that he had asked for discovery concerning the fingerprints but had not received it. The court found that because defense counsel had known about the bag with Jones's fingerprint on it since the preliminary hearing and had the opportunity to conduct an independent analysis of that evidence, counsel could not claim surprise. However, the court gave counsel three days to consult with an expert and go over the evidence.

Thereafter, defense counsel did not provide any forensic evidence concerning the fingerprint.

Counsel for Jones also informed the court that he would be calling Jones's mother to testify as an alibi witness for Jones. However, Jones's mother was unavailable at the time of Jones's defense case, and Jones rested without calling her as a witness.

At the hearing on Jones's motion for new trial, Jones called his wife, Latania Jones (Latania), to testify. Latania testified that Jones was at home with her on the morning of the robbery. Janice Thomas, the sister of Latania, was dating Penton at the time of the attempted robbery of Symbolic. She also testified that she did not own her own car and would travel between San Diego and Los Angeles to visit Penton in cars rented by Penton. Janice also stated that she informed Penton that Jones had been arrested in Penton's rental car. Penton told Janice that he was going to report the car stolen.

Joyce Thomas, Latania's mother, also testified. She stated that she came to Jones's house at approximately 9:45 a.m. that morning and saw Jones there. Loretta Bradley, a neighbor of the Jones's, testified that she saw Jones in the apartment complex laundry room at approximately 10:00 a.m. on the date of the robbery.

Jones also called forensics specialist Lisa Di Meo to testify in support of his motion for a new trial. Di Meo testified that the fingerprint left on the plastic bag belonged to Jones. However, she also testified that the duct tape used to bind Hughes, which was not tested by the People, had fingerprints that did not match Jones's.

Jones's trial counsel, Michael Taggart, testified that he spoke with Jones's wife and Jones about a possible alibi defense. He stated that he did not hire an investigator to talk

to witnesses because he did not have the money. He told Jones that Jones would have to pay for an investigator. Jones's counsel testified that he was now aware that he could have obtained county funds for an investigator.

Counsel for Jones admitted that he knew there was fingerprint evidence almost immediately after being retained. He made a general request for discovery at the beginning of the case and made oral requests to the prosecutor for fingerprint evidence. However, he never made written requests specifically for fingerprint evidence, nor did he bring a motion to compel.

When the court gave counsel time to hire an expert, he could not remember if he was aware that he could obtain county funding for such services. Counsel made no attempt to contact an expert during the recess from Thursday afternoon until Monday.

Counsel did not recall Jones giving him the names of other potential alibi witnesses. Counsel stated that he advised Jones not to testify.

Jones also testified on his motion for new trial. Jones testified that he fired his first attorney, John Covey, because he did not have an investigator. Jones stated that he hired Taggart because of his assurances that there would be a full investigation. Jones testified that he gave the names of all potential witnesses to Taggart. The retainer Jones gave Taggart was supposed to be for all expenses related to trial. Taggart never told him he needed extra funds for an investigator or expert advice. In response to cross-examination by the People, Jones stated that he had never met Penton.

The court denied Jones's motion for new trial, finding that "completely [i]nsurmountable problems that counsel had in this matter" precluded his claim of

ineffective assistance of counsel. The court stated that counsel could not have overcome (1) the identification of Jones by the victims; (2) his fingerprint on the bag found at the scene; (3) the fact Jones was driving Penton's rental car when apprehended; and (3) his being in possession of a gun that matched the one used in the robbery when apprehended. The court also found that Jones's alibi defense was simply not credible.

2. *Penton's motion for new trial*

Penton brought a motion for new trial on the basis that a police report indicating that he had reported his rental car stolen shortly after Jones was arrested was not timely disclosed by the People. According to counsel for Penton, that report was not turned over to the defense until during the trial. Penton would have used this report to argue that he would not have reported the car stolen if he were involved in the charged crimes. He would have argued that he and Jones did not know each other and Jones committed the robbery with someone else.

The court denied Penton's motion. First, the court noted the lack of credibility to Penton's defense that he did not know Jones or that his rental car was stolen. The court pointed to the testimony at Jones's motion for new trial of Janice Thomas, Jones's wife's sister. As discussed, *ante,* Janice testified that she was Penton's girlfriend at the time, that Penton knew Jones through her, that Jones would let her use his rental cars, and that on the day Jones was arrested, Penton had loaned the car to Jones. The court also noted that Thomas testified that after Jones was arrested, she called Penton to let him know that he had been arrested in Penton's rental car. The court noted that it was only *after* Jones was

arrested and Penton was informed of the arrest that he notified the police that his car was stolen.

The court also stated that information concerning the police report was available to Penton. The court further observed that it would not have allowed the report to come in unless Penton took the stand and testified, as the report was inadmissible hearsay. The court found it was unlikely the defense would have called Penton to testify given the facts of the case.

DISCUSSION

I. *The Appeals*

A. *Motions for New Trial*

1. *Standard of review*

"'"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."' [Citations.] "'[I]n determining whether there has been a proper exercise of discretion on such motion, each case must be judged from its own factual background."' [Citation.]" (*People v. Delgado* (1993) 5 Cal.4th 312, 328.)

2. *Jones's motion*

Jones contends that the court should have granted his motion for a new trial on the basis that his trial attorney rendered ineffective assistance of counsel. We reject this contention.

"The Sixth Amendment guarantees competent representation by counsel for criminal defendants." (*People v. Holt* (1997) 15 Cal.4th 619, 703, citing *Strickland v.*

Washington (1984) 466 U.S. 668, 690 (*Strickland*) & *People v. Freeman* (1994) 8 Cal.4th 450, 513.) "A meritorious claim of constitutionally ineffective assistance must establish both: '(1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.]'" (*People v. Holt, supra,* 15 Cal.4th at p. 703.)

Further, on appeal we apply a deferential standard in determining whether an ineffective assistance of counsel claim has merit. "'[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . .' [Citation.]" (*In re Cudjo* (1999) 20 Cal.4th 673, 692.) We may not "second-guess" counsel's strategic decisions and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland, supra,* 466 U.S. at p. 689.)

Here, even assuming that Jones could show ineffective assistance of counsel, he cannot meet the second prong of the *Strickland* test: that there is a reasonable probability that but for counsel's errors a determination more favorable to Jones would have resulted. Therefore, we need not even consider whether Jones's counsel's performance was deficient. (*Strickland, supra,* 446 U.S. at p. 697.)

The evidence of Jones's guilt was overwhelming. This included the undisputed fingerprint evidence on the bag carrying the guns and tape, the eyewitness identifications, and Jones's capture after fleeing police in Penton's rental car and throwing a gun out the window of the car. Thus, it is not reasonably probable that but for counsel's alleged

deficiencies Jones would have received a more favorable result, and the court did not abuse its discretion in denying Jones's motion for new trial.

3. *Penton's motion*

Penton asserts that the People's alleged failure to turn over a police report concerning his report to police that his rental car was stolen shortly after Jones was arrested violated his federal due process rights and California statutory provisions (§ 1054 et seq.) concerning discovery obligations and the court therefore erred in denying his motion for a new trial. We reject this conclusion.

"The obligation of the People to disclose information to the defense is dependent upon whether that obligation has a constitutional or statutory basis. As articulated by the United States Supreme Court in *Brady v. Maryland* (1963) 373 U.S. 83, the prosecution has a sua sponte obligation, pursuant to the due process clause of the United States Constitution, to disclose to the defense information within its custody or control which is material to and exculpatory of, the defendant. [Citations.] This constitutional duty is independent of and to be differentiated from, the statutory duty of the prosecution to disclose information to the defense. [Citations.] The California statutory scheme, adopted by initiative in 1990, requires that the prosecution disclose specified information to the defense, as set out in section 1054.1, including, among other things, the names and addresses of witnesses which the prosecution intends to call at trial. [Citation.]" (*People v. Bohannon* (2000) 82 Cal.App.4th 798, 804-805 (*Bohannon*).)

A claim that the prosecution has violated its obligations to disclose evidence under section 1054 et seq. subjects the prosecution to possible sanctions if brought to the court's

attention prior to the close of trial. (*Bohannon, supra,* 82 Cal.App.4th at p. 805.) If such a request is not made, however, and a challenge is only made by appeal from a judgment, our review is governed by the same standards as those applied to an alleged constitutional violation. (*Ibid.*) Under this standard, "the defendant must establish that the information not disclosed was exculpatory and that '"there is a reasonable probability that, had the evidence been disclosed . . . , the result of the proceedings would have been different."' [Citations.] Evidence is material in the context of review of a discovery violation postconviction if 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' [Citation.]" (*Ibid.*)

On this record, we conclude that there is no reasonable probability that the outcome of the trial would have been different had the police report of Penton's call reporting his vehicle stolen been turned over sooner by the People to Penton's counsel. As the court noted, and Penton's counsel acknowledged at trial, the police report was inadmissible hearsay. (See Evid. Code, § 1200.)[2] Penton, obviously aware of his own report to police, could have testified to this incident. However, Penton elected to not testify. Further, the information was hardly exculpatory. Penton only called police to report the vehicle stolen after Jones was arrested while driving in it. This was after, and presumably in response to, his girlfriend's telling him of Penton's arrest. The

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2 Evidence Code section 1200 provides in part: "(a) 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. [¶] (b) Except as provided by law, hearsay evidence is inadmissible."

circumstances of Penton's call, contrary to Penton's assertion, actually strengthened the People's case as it indicated an attempt to distance himself from Jones and the vehicle. There is no reasonable probability that the result would have been different had the police report been turned over to Penton earlier.

Penton also asserts that the court's consideration of testimony taken from the hearing on Jones's new trial motion, when Penton was not present and was unable to cross-examine witnesses, was improper because the evidence was inadmissible hearsay and violated his constitutional right to confront witnesses against him. We reject this contention. That evidence was only a portion of the facts that the court considered in rejecting Penton's motion for a new trial. Of primary importance was the fact that Penton's report to police of the vehicle being stolen was within his own knowledge and he could have testified to these facts at trial. His election not to testify, however, rendered any claim of prejudice in the People's failure to turn over the actual report of no moment. Further, as discussed, *ante*, given the circumstances under which Penton reported his vehicle stolen, the report was simply not exculpatory. The court did not err in denying Penton's motion for a new trial.

B. *Sufficiency of the Evidence*

Jones asserts that the evidence is insufficient to support his conviction for the attempted robbery of Bazaldua, Kueber or Williams. Jones also contends that the evidence is insufficient to support the enhancement that he personally used a firearm when he and Penton attempted to rob these individuals. We reject these contentions.

1. *Standard of review*

On an appeal contending there is insufficient evidence to support a verdict, we review the evidence in the light most favorable to the judgment and, in so doing, determine whether there is substantial evidence such that a rational trier of fact could find the elements of the crime beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) The reviewing court will presume in support of the trial court's judgment the existence of every fact the trier of fact could reasonably infer from the evidence. (*People v. Iniguez* (1994) 7 Cal.4th 847, 854.) "The focus of the substantial evidence test is on the *whole* record of evidence presented to the trier of fact, rather than on "'isolated bits of evidence.'" [Citation.]" (*People v. Cuevas* (1995) 12 Cal.4th 252, 261.) "That the evidence might lead to a different verdict does not warrant a conclusion that the evidence supporting the verdict is insubstantial." (*People v. Holt, supra,* 15 Cal.4th at p. 669; *People v. Berryman* (1993) 6 Cal.4th 1048, 1084.)

Further, it is the exclusive function of the trier of fact to assess the credibility of witnesses. (*People v. Alcala* (1984) 36 Cal.3d 604, 623; *People v. Lopez* (1982) 131 Cal.App.3d 565, 571.) We will "'not substitute our evaluation of a witness's credibility for that of the fact finder.'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; see also *People v. McLead* (1990) 225 Cal.App.3d 906, 917.) Moreover, it is not our function to reweigh the evidence. (*People v. Perry* (1972) 7 Cal.3d 756, 785, overruled in part on other grounds in *People v. Green* (1980) 27 Cal.3d 1.) Thus, a judgment will not be overturned even if we might have made contrary findings or drawn different inferences,

as "[i]t is the jury, not the appellate court, that must be convinced beyond a reasonable doubt." (*People v. Perez* (1992) 2 Cal.4th 1117, 1126.)

2. *Analysis*

a. *Attempted robbery counts*

Robbery is the "taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) An attempted robbery occurs when there is "a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a.) Although the act must constitute more than mere preparation, it need not be the last proximate or ultimate step toward commission of the crime. (*People v. Kipp* (1998) 18 Cal.4th 349, 376.)

Jones asserts that the attempted robbery counts cannot stand as he and Penton only had the intent to rob the business of Symbolic, not the individual employee victims. This contention is unavailing.

To convict a person of robbery, or attempted robbery, possession of the property by the victimmay be actual or constructive. (*People v. Nguyen* (2000) 24 Cal.4th 756, 762; CALJIC No. 1.24.) The theory of constructive possession has been used to expand the concept of possession to include store employees not in actual possession of property as victims of robbery: "'Robbery is an offense against the person; thus a store employee may be the victim of a robbery even though he is not its owner and not at the moment in immediate control of the stolen property.' [Citation.]" (*People v. Miller* (1977) 18 Cal.3d 873, 880.) Indeed, employees may be victims of robbery even if they did not have a

specific responsibility for handling money for the business that is robbed. (*People v. Jones* (2000) 82 Cal.App.4th 485, 490.)

Here, it is undisputed that Bazaldua, Kueber and Williams were employees of Symbolic, acting in their representative capacities at the time of the attempted robbery. Thus, it matters not, as Jones argues, that he did not have the intent to rob these individuals, only Symbolic. There is sufficient evidence to support Jones's conviction on the attempted robbery counts.

b. *Personal use of firearm enhancement*

On the attempted robbery counts it was also alleged under section 12022.53, subdivision (b) that Jones personally used a firearm in the commission of those crimes. Section 12022.53, subdivision (b) provides in part that "any person who is convicted of a felony specified in subdivision (a), and who in the commission of that felony personally used a firearm, shall be punished by a term of imprisonment of 10 years in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony." Subdivision (a)(4) specifies robbery as one of the felonies subjecting a defendant to the terms of section 12022.53.

Jones asserts that the court improperly imposed the firearm use enhancement on his conviction for the attempted robbery of Bazaldua, Kueber and Williams as two of the victims did not see him with a gun, and the third victim only saw him with a gun as he

ran from the showroom and he did not point the gun at that victim. The case of *People v. Granado* (1996) 49 Cal.App.4th 317 (*Granado*) disposes of this contention.[3]

As the court stated in *Granado*, the term "use of a firearm" is not limited in "its application to situations where the gun is pointed at the victim or the defendant issues explicit threats of harm." (*Granado, supra,* 49 Cal.App.4th at p. 322.) Moreover, "a gun may be used "'in the commission of'" a given crime even if the use is directed toward someone other than the victim of that crime." (*Id.* at pp. 329-330.) Thus, "a defendant uses a gun 'in the commission' of a crime when he or she employs the gun to neutralize the victim's companions, bystanders, or other persons who might otherwise interfere with the successful completion of the crime." (*Id.* at p. 330.)

Here, although two of the victims did not see Jones display a gun and the gun was not pointed at the third victim, there is substantial evidence that Jones used the gun to control French, Phillips and Hughes. These individuals could have aided Bazaldua, Kueber and Williams. Accordingly, there is substantial evidence to support the section 12022.53, subdivision (b) enhancements.

C. *Instruction under CALJIC No. 17.41.1*

Jones contends the court erred by instructing the jury under CALJIC No. 17.41.1. Jones asserts that these instructions impermissibly infringed on his federal and state constitutional rights to a fair trial by eroding the privacy and secrecy of jury

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3 *Granado* concerned the interpretation of section 12022.5, subdivision (a)(1), which provides for an enhancement to be imposed on "any person who personally uses a firearm in the commission or attempted commission of a felony . . . ."

deliberations, thereby chilling the free exchange of jurors' views and their independent judgment, and pressuring minority jurors to acquiesce in the views of the majority jurors. We reject these contentions.

The court instructed the jury under CALJIC No. 17.41.1 as follows:

> "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation."

The issue of the constitutionality of CALJIC No. 17.41.1 was decided by the California Supreme Court on July 18, 2002, in the case *People v. Engelman* (2002) 28 Cal.4th 436 (*Engelman*).) In that case, the court concluded that CALJIC No. 17.41.1 "does not infringe upon [a] defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict . . . ." (*Id.* at pp. 439-440.) Nevertheless, the high court also held that "CALJIC No. 17.41.1 should not be given in the future. The law does not require that the jury be instructed in these terms, and the instruction, by specifying at the outset of deliberations that a juror has the obligation to police the reasoning and decisionmaking of other jurors, creates a risk of unnecessary intrusion on the deliberative process." (*Id.* at p. 441.)

In rejecting the defendant's assertion that CALJIC No. 17.41.1 violated his right to a trial by jury and a unanimous jury verdict by impairing the free and private exchange of views by jurors in the deliberation process, the court stated that "although the secrecy of deliberations is an important element of our jury system," (*Engelman, supra,* 28 Cal.4th

at p. 443), there is no authority for the proposition that "the federal constitutional right to trial by jury (or parallel provisions of the California Constitution, or other state law) requires absolute and impenetrable secrecy for jury deliberations in the face of an allegation of juror misconduct, or that the constitutional right constitutes an absolute bar to jury instructions that might induce jurors to reveal some element of their deliberations." (*Ibid*.) "[A] juror is required to apply the law as instructed by the court, and refusal to do so *during deliberations* may constitute a ground for discharge of the juror. [Citation.] Refusal to deliberate also may subject a juror to discharge [citation], even though the discovery of such misconduct ordinarily exposes facts concerning the deliberations—if, after *reasonable inquiry* by the court, it appears 'as a "demonstrable reality" that the juror is unable or unwilling to deliberate.' [Citation.]" (*Id.* at pp. 443-444.)

The court also rejected the defendant's claim that instructing the jury under CALJIC No. 17.41.1 violated his right to a unanimous jury verdict and to the independent and impartial decision of each juror because "[t]he instructions as a whole fully informed the jury of its duty to reach a unanimous verdict based upon the independent and impartial decision of each juror." (*Engelman, supra,* 28 Cal.4th at p. 444.].) The court also found that the giving of CALJIC No. 17.41.1 was not overly coercive to deadlocked juries or a holdout juror, as it "is not directed at a deadlocked jury and does not contain language suggesting that jurors who find themselves in the minority, as deliberations progress, should join the majority without reaching an independent judgment. The instruction does not suggest that a doubt may be unreasonable if not shared by a majority

of the jurors, nor does it direct that the jury's deliberations include such an extraneous factor." (*Engelman, supra,* 28 Cal.4th at pp. 444-445.)

However, after rejecting the defendant's constitutional claims, the high court went on to criticize CALJIC No. 17.41.1 as unnecessary and creating at least a *risk* of the type of problems the defendant highlighted: "There is risk that the instruction will be misunderstood or that it will be used by one juror as a tool for browbeating other jurors. The instruction is given immediately before the jury withdraws to commence its deliberations and, unlike other instructions cautioning the jury against misconduct such as visiting the scene of the crime or consulting press accounts, it focuses on the process of deliberation itself. We believe it is inadvisable and unnecessary for a trial court to create the risk of intrusion upon the secrecy of deliberations or of an adverse impact upon the course of deliberations by giving such an instruction." (*Engelman, supra,* 28 Cal.4th at p. 445.) The court also noted that juries are already given adequate instructions that guard against juror misconduct and explain the jury's duty to follow the law as given in the instructions. (*Id.* at pp. 448-449.) Therefore, the court concluded that while CALJIC No. 17.41.1 was not constitutionally infirm, courts were directed not to instruct juries with this provision in the future. (*Engelman, supra,* 28 Cal.4th at p. 449.)

Based upon this direction from the California Supreme Court, we must also conclude that CALJIC No. 17.41.1 is not constitutionally infirm. The court thus did not err in instructing the jury under this provision in the instant case.

Further, even if it had been improper for the court to instruct the jury under CALJIC No. 17.41.1, any such error would have been harmless beyond a reasonable

doubt. There is no evidence there was a deadlock or any holdout jurors. There is no evidence that any juror refused to follow the law. Further, the evidence of Jones's guilt, given his identification by several eyewitnesses, was overwhelming. Because there is no evidence "that CALJIC No. 17.41.1 had any effect on this case whatsoever" (*People v. Brown* (2001) 91 Cal.App.4th 256, 271), any error by the court in instructing the jury under CALJIC No. 17.41.1 did not constitute reversible error. (*People v. Brown, supra,* 91 Cal.App.4th at p. 271; *People v. Molina* (2000) 82 Cal.App.4th 1329, 1335.)

D. *Court's Decision to Impose Consecutive Sentences upon Jones and Penton*

Jones and Penton both contend that because the record indicates that the court did not know that it had the discretion in this case to sentence them concurrently rather than consecutively, the matter must be remanded to the superior court to allow the trial judge to exercise such discretion. We reject these contentions as the record demonstrates that the court did exercise its discretion in sentencing Jones and Penton, but elected to impose consecutive, not concurrent sentences.

1. *Discretion to impose concurrent sentence as to Jones*

a. *Standard of review*

We review a court's discretionary sentencing decisions under the abuse of discretion standard. (*People v. Warner* (1978) 20 Cal.3d 678, 683.) This discretion is only abused if the court's decision "'exceeds the bounds of reason, all of the circumstances being considered.'" (*Ibid.*)

b. *Analysis*

In *People v. Hendrix* (1997) 16 Cal.4th 508, 514-515, the California Supreme Court held that courts have the discretion to impose consecutive or concurrent sentences where a defendant has two or more prior felony convictions and commits serious or violent felonies against multiple victims on the same occasion as to the present crimes. Here, it is undisputed that all of the charged offenses occurred on the same occasion, giving the court the discretion to impose concurrent or consecutive sentences against Jones and Penton.

Moreover, in exercising this sentencing discretion, the court must state reasons for its decision on the record. (*People v. Champion* (1995) 9 Cal.4th 879, 934; § 1170, subd. (c).) However, in making such a statement, the court need not state facts, only reasons for the sentencing choice. (*People v. Granado* (1994) 22 Cal.App.4th 194, 203.) "'[S]o long as the record discloses facts which adequately support those reasons, the trial court's choice will be presumed to have been made on the basis of those facts. . . .' [Citation.] The presumption is rebuttable." (*Ibid.*)

Here, Jones and Penton assert that the record is unclear as to whether the court understood that it had the discretion to sentence Penton and Jones concurrently or consecutively, and thus this case must be remanded to allow the court to consider whether concurrent or consecutive sentences are warranted. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 137-141 [remand required where record failed to disclose whether court understood it had discretion to impose concurrent terms].)

The record adequately demonstrates, however, that the court understood that it had the discretion to impose concurrent sentences on Jones and Penton but, based upon the circumstances of the crimes, chose to impose consecutive sentences. In sentencing Jones the court stated:

> "[T]his case had probably the most potential for harm for a group of people I have ever seen in a robbery. Had it not been for the courage of the one employee to escape, God knows what would have happened to these people. Mr. Penton, Mr. Jones were armed. It is obvious there was somebody else that was assisting them in the commission of this offense. This was a set up. Whether it was somebody inside or from the outside, I know not. But this was set up. These people were bound. And there's no telling what the ultimate result of this robbery could have been if the one employee did not escape.
>
> "*All of the victims are separate and distinct in this case, justifying the court in imposing consecutive sentencing.*" (Italics added.)

In sentencing Penton, the court stated:

> "Counts two, three, four, five[,] six, seven, and eight all represent different victims, different locations, *justifying the utilization of consecutive sentencing.* It goes without saying that this crime is one of the most violent, it involved numerous victims, they are not individually capable of being lumped together, they are separate and distinct, including the two minor children whose future having been part of this is certainly in doubt in terms of their emotional well-being.
>
> "At any rate, the court *specifically elects to impose consecutive sentencing* . . . ." (Italics added.)

The court's use of the words "justifying" and "elects" demonstrates that the court understood that it had the discretion not to impose a consecutive sentence. The court would not have used these words if it believed it was *required* to impose consecutive sentences in this case. Further, the court's description of the serious and violent nature of

the crimes, and the fact there were multiple victims, including two minor children, would not have been necessary if the court believed it was required to impose consecutive sentences. Thus, there is no basis for a remand for resentencing for the court to exercise its discretion to impose consecutive or concurrent terms.[4] The court understood its discretion, exercised such discretion, and found, based upon the seriousness of the crime and the multiple victims, that consecutive sentences were warranted.[5]

E. *Sentence in San Bernardino Case*

Penton contends that the court improperly imposed a full term 32-month consecutive sentence in San Bernardino County case No. FV1010921, instead of one-third the midterm. The People agree and request that we order the judgment modified to reflect the correct sentence and also that he is awarded presentence custody credits in that case.

Section 1170.1, subdivision (a) provides in part:

> "Except as otherwise provided by law, and subject to Section 654, when any person is convicted of two or more felonies, *whether in the*

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4 The People also argue that the court's sentence as to Penton was appropriate as it found it did *not* have the discretion to impose concurrent terms because his crimes were not committed on the same occasion and from the same set of operative facts. However, the court's comments concerning the different victims and different locations was not a statement explaining that Penton could not be given a concurrent sentence. Rather, the court's statements were concerning the multiple offenses and the seriousness of those offenses, thereby justifying consecutive sentences. It is clear that because there was "a close temporal and spatial proximity between the acts underlying the current convictions," they occurred on the "same occasion" and could support consecutive sentencing. (*People v. Deloza* (1998) 18 Cal.4th 585, 595.)

5 This also disposes of Jones's contention that his trial counsel was ineffective in failing to object to the consecutive sentence imposed against him.

> *same proceeding or court or in different proceedings or courts*, and whether by judgment rendered by the same or by a different court, *and a consecutive term of imprisonment is imposed under Sections 669 and 1170,* the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. *The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses.*" (Italics added.)

Prior to the trial of this matter, Penton pleaded guilty in San Bernardino County case No. FV1010921 to a charge of possession of marijuana for sale. Penton was sentenced in that case to 32 months in prison. However, when the court sentenced Penton in this matter, the court simply ruled that the sentence in the present cases was to run "consecutive to the term [Penton] is currently sentenced to receive in [San Bernardino County case No.] FV1010921." The court did not reduce the sentence in the San Bernardino case to one-third the midterm as required by section 1170.1, subdivision (a). Further, the court failed to give credit for his presentence custody in that case. (See *People v. Lacebal* (1991) 233 Cal.App.3d 1061, 1065.) Accordingly, as the People concede, Penton's sentence in San Bernardino County case No. FV1010921 must be modified and credit awarded for his presentence custody in that case.

F. *Penton's Motion to Dismiss a Strike*

Penton contends that because the court was unaware it had the discretion to dismiss a strike allegation, this matter must be remanded in order to allow the court to exercise such discretion. We reject this contention.

In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, the California Supreme Court held that a trial court retains the power to dismiss a strike on its own motion in the interests of justice. (*Id.* at p. 504.) The high court further held that where the record is unclear as to whether the trial court understood it had such discretion, remand for an exercise of discretion was not necessary where "the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations." (*Id.* at p. 530, fn. 13.)

Here, Penton filed a written motion requesting that the court dismiss a strike. At sentencing, the court indicated that it had considered Penton's motion. The parties then argued the merits of Penton's motion. However, when the court imposed Penton's sentence, it did not specifically indicate that it was denying his motion.

On this record, we conclude that the court did understand that it had the power to dismiss a strike, but simply rejected Penton's motion. The court acknowledged that it had considered the motion and listened to arguments of counsel. There was no comment by the court or the People indicating a belief that the court did not have the discretion to dismiss a strike. On the contrary, the court's discussion of the sophistication of the crimes, the threat of violence, and the impact upon the victims in sentencing Penton demonstrates that the court did understand it possessed the discretion to strike a strike,

but simply refused to exercise it. Moreover, it is clear that the court, by its comments concerning the nature of the crimes, would not have dismissed a strike in any event. Accordingly, there is no basis for a remand to allow the court to exercise its discretion to strike a strike.

II. *The Petition*

Accompanying this appeal is a petition for writ of habeas corpus filed by the defendant Jones in January 2002. In the petition, Jones contends that the judgment must be reversed because he rejected a plea offer based upon incorrect information given by the court and counsel concerning the maximum term he could receive upon conviction if he went to trial. Specifically, Jones asserts that at the time of the plea offer he was advised that he faced a possible maximum term of 24 years in prison and that he was actually sentenced to a term of 37 years in prison.

However, the record reflects that at the time of the plea offer, Jones was charged with two counts of robbery, four counts of attempted robbery, and two counts of false imprisonment by violence, menace, fraud or deceit, which would only subject him to a term of 24 years. It was only *after* he rejected the plea offer that the People amended the information to change one of the robbery counts to attempted robbery, and, allege as to all counts that he personally used a firearm. The amended information thus made Jones subject to a term of 37 years in prison. Accordingly, based upon these facts, the petition is summarily denied as not having made a prima facie showing for habeas corpus relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.)

DISPOSITION

The court is instructed to modify the judgment as to defendant Penton to reflect a sentence of one third the midterm in San Bernardino County case No. FV1010921. The court is ordered to correct the abstract of judgment and to forward a corrected copy to the Department of Corrections. In all other respects the judgments are affirmed. The petition is denied.

NARES, J.

WE CONCUR:

KREMER, P. J.

BENKE, J.